

DECISION

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**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-214432**DATE:** July 25, 1984**MATTER OF:** Lynn Francis Jones**DIGEST:**

1. Where an individual consultant's services were procured under a contract which established an employer-employee relationship with the Government rather than an independent contractor relationship, his entitlement to travel and relocation expenses is determined by the statutes and regulations concerning reimbursement for travel and relocation expenses of Government employees. Where the consultant was apparently employed in a manpower shortage position, he may be allowed reimbursement under 5 U.S.C. § 5723 for his travel expenses and for the transportation of his household goods and dependent from his residence at the time of his initial employment to his duty station, but not for return to his residence upon completion of the contract.
2. A consultant whose services are secured on an employment rather than an independent contractor basis is entitled to accrual of annual and sick leave, if he is eligible under the applicable provisions of law. The consultant is entitled to leave accrual where it appears he had a regularly scheduled tour of duty. In addition, the consultant is entitled to compensation for holidays on which he did not perform any work since his contract contained an express provision to that effect.

The basic issues before us concern the entitlement to transportation of dependent and household goods and compensation for leave of Mr. Lynn Francis Jones, an individual consultant hired under a personal services contract under

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authority of 5 U.S.C. § 3109.¹ Specifically, the questions concern whether he is entitled to reimbursement of the costs of the transportation of his dependent wife and household goods from his residence at the time of his initial employment to the locality of his duty station and return upon the completion of his service under the contract. We are also asked whether he is entitled to leave benefits as an employee of the Government under the contract.

We find that the personal services contract in this case creates an employer-employee relationship rather than an independent contractor relationship; thus the consultant is entitled to reimbursement for travel and relocation expenses on the same basis as a Government employee. As an appointee to a manpower shortage position Mr. Jones may be allowed reimbursement for his travel expenses from his place of residence at the time of his appointment to the locality of his duty station together with the transportation thereto of his wife and household goods. However, there is no authority to reimburse him for the return transportation of his wife and household goods to his place of residence. We also find that he is entitled to accrue annual and sick leave.

FACTS

Effective May 20, 1982, Mr. Jones, a British citizen, was employed by the U.S. Army White Sands Missile Range, New Mexico, under a personal services contract as an Operations Research Analyst and consultant. The "principal place of performance" of the contract was designated to be the White Sands Missile Range. The contract provided that the services to be rendered by Mr. Jones were to be performed "under Government supervision." In addition, the contract included terms for payment to be made to Mr. Jones of fixed biweekly amounts of compensation, accrual of sick and annual leave, payment for holidays, and Government furnished equipment, supplies, furniture, telephone and office space. The term of the initial contract was through September 30,

¹ This matter comes before us pursuant to a request for a decision presented by Mr. C. K. Hardy, Finance and Accounting Officer, U.S. Army, White Sands Missile Range, New Mexico.

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1982,² and the record shows that from the outset it was intended that these services were to be rendered through April 30, 1983, and subsequently through April 30, 1984.

Contract line item 0002 contained the following authorization.

"Travel, per diem, and moving expenses from residence to regular place of employment. To be reimbursed in accordance with Standardized Government Travel Regulations."

Mr. Jones was reimbursed by the Army for his travel from London, England, to El Paso, Texas, and the transportation of his wife and his household goods from England to El Paso incident to his reporting for duty. Apparently, Mr. Jones resided in El Paso which is near White Sands, during the period of his employment. Mr. Jones was reimbursed by the agency in the total amount of \$3,105.65 for the transportation of his household goods (\$2,546.65) and for his wife's air fare (\$559). We are now asked whether such reimbursement was proper. The question also arises as to whether he may be authorized reimbursement for the return transportation of his wife and household goods to London upon the expiration of his contract.

The contract for Mr. Jones' personal services as a consultant was entered into in May 1982 pursuant to the authority contained in section 703 of the Department of Defense Appropriation Act, 1982, Public Law 97-114, December 29, 1981, 95 Stat. 1565, 1578. That provision in pertinent part authorized the Secretary of Defense and the Secretaries of the Army, Navy, and Air Force to procure services in accordance with 5 U.S.C. § 3109 and to pay to the individuals involved, in connection with such employment, their expenses of transportation and per diem in lieu of subsistence while traveling from their homes or places of business to their official duty stations and return as may

² Paragraph 22-204.2 of the Defense Acquisition Regulations provides that a contract for the procurement of experts and consultants under 5 U.S.C. § 3109 shall not cross fiscal years.

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be authorized by law.³ The Army's authority to hire experts and consultants under 5 U.S.C. § 3109 continued in effect under similar authority contained in appropriations acts for fiscal years 1983 and 1984.⁴

EMPLOYER-EMPLOYEE RELATIONSHIP

When authorized by an appropriation or other statute an agency may procure by contract the temporary (not in excess of 1 year) or intermittent services of experts and consultants without regard to the provisions governing appointments in the Federal service. 5 U.S.C. § 3109. In view of the purely personal nature of the services provided to the Army by Mr. Jones as an individual and of the contract provision for Government supervision over the services rendered by Mr. Jones, we regard the contract as establishing an employer-employee relationship between him and the Government rather than an independent contractor relationship. See 26 Comp. Gen. 188 (1946), 27 Comp. Gen. 46 (1947) and 53 Comp. Gen. 542 (1974).

TRAVEL AND TRANSPORTATION EXPENSES

An expert or consultant employed under a personal services contract which establishes an employer-employee relationship is subject to the laws of general application to Government employees. See B-125559, July 30, 1957, and 53 Comp. Gen. 542 (1974). As an employee, Mr. Jones' entitlement to reimbursement for travel and relocation expenses is restricted to the travel and relocation entitlements specifically authorized by law and implementing regulations for Government employees. 25 Comp. Gen. 731

³ In addition, section 704 of Public Law 97-114 waived the provisions of law prohibiting payment of compensation to, or employment of, any person not a citizen of the United States for personnel of the Department of Defense.

⁴ See sections 703 and 704 of Public Law 97-377, December 21, 1982, 96 Stat. 1830, 1849 and sections 703 and 704 of Public Law 98-212, December 8, 1983, 97 Stat. 1421, 1437.

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at 733 (1946), 27 Comp. Gen. 695, 697 (1948), B-167815(1), January 13, 1970, and John P. Quillin, B-180698, August 19, 1974. Compare B-88975, October 27, 1949. With regard to the authorization of travel expenses and per diem for experts and consultants procured under contract pursuant to 5 U.S.C. § 3109, the Defense Acquisition Regulations provide:

"* * * the contract may provide for such per diem and travel expenses as would be authorized for a Government employee, including actual transportation and per diem in lieu of subsistence while the expert or consultant is traveling between his home and place of business." Paragraph 22-210(a), Defense Acquisition Regulations.

That regulation is consistent with the view that as a contract employee under authority of 5 U.S.C. § 3109 Mr. Jones is entitled to those travel expenses which may be authorized for a Government employee including experts and consultants.

The record shows that some agency officials including the contracting officer believe that paragraphs 7-503.2, 15-205.25(a) and 15-205.46(e) of the Defense Acquisition Regulations provide authority to authorize round-trip transportation for Mr. Jones' wife and for the transportation of his household goods notwithstanding the limitations contained in the laws and regulations providing travel and relocation benefits for Government employees.

Paragraph 7-503.2 of the Defense Acquisition Regulations provides that in a personal services contract entered into by an individual, other than an alien scientist, the contract shall contain the following clause:

"the Contractor shall be paid (i) a per diem rate in lieu of subsistence for each day the Contractor is in a travel status away from his home or regular place of employment in accordance with Standardized Government Travel Regulations as authorized in appropriate Travel Orders, and (ii) such other

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transportation expenses as may be provided for in the Schedule."

In his determination and findings dated November 4, 1983, the contracting officer states that pursuant to paragraph 7-503.2 of the Defense Acquisition Regulations it was the intent of the parties involved that travel, per diem and moving expenses would be allowable to the extent provided in Section 15, Part 2 of the Defense Acquisition Regulations. We do not view the contractual clause set forth at paragraph 7-503.2 of the Defense Acquisition Regulations as providing any authority to allow payment of travel and relocation expenses other than that otherwise allowable by statute and implementing regulations for Government employees including experts and consultants. Furthermore, Section 15, Part 2 of the Defense Acquisition Regulations "Contracts with Commercial Organizations" is by its own definition only applicable to a contract with commercial firms and not with individual experts and consultants. Accordingly, the provisions contained in Section 15, Part 2 of the procurement regulations which authorize reimbursement for the costs of travel expenses of members of the employee's immediate family and transportation of household goods are not applicable to individuals who have entered into an employer-employee relationship with the Government.

Thus, it is clear that Mr. Jones' entitlement to reimbursement for his wife's travel and the transportation of his household goods rest upon the statutory provisions concerning travel and relocation allowances of Government employees including experts and consultants employed by the Government.

As indicated, contract line item 0002 provided that Mr. Jones was to receive travel, per diem and moving expenses from his residence to his regular place of employment. This authorization was apparently predicated upon 5 U.S.C. § 5703 which provides that an expert or consultant serving on an intermittent basis and paid on a per diem when actually employed basis may be allowed travel or transportation expenses including per diem while away from his home or regular place of business. The provision set forth at 5 U.S.C. § 5703 only applies where it is intended that the services are to be rendered by the expert or consultant on an occasional or irregular basis. See

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35 Comp. Gen. 90 (1955), and Hector Avila Morales Jr., B-193170, May 16, 1979.

Lines B.1 and B.2 of the contract dated May 20, 1982, provided that Mr. Jones' compensation would be paid on a time basis biweekly and that the cost for each biweekly period would be in the amount of \$1,923.08. The contract also shows that the estimated costs for Mr. Jones' compensation for 10 biweekly pay periods was in the amount of \$19,230.80 (or ten times the pay rate for each biweekly pay period). The May 20, 1982 contract was subsequently extended from October 1, 1982, through April 30, 1983. The modification indicated that his compensation for the additional 16 biweekly pay periods would continue at the rate of \$1,923.08 per pay period since the estimated total compensation for the 26 pay periods was in the amount of \$50,000.08 (or 26 times his biweekly rate of pay). In April of 1983 the contract originally entered into on May 20, 1982, was extended for a period of five months from May 1, 1983, through September 30, 1983. The contract modification provided that Mr. Jones would be compensated at the rate of \$2,124 biweekly. On October 4, 1983, the May 20, 1982 contract was further extended for seven months from October 1, 1983, through April 30, 1984. This contract modification again provided that Mr. Jones would be compensated at the rate of \$2,124 biweekly.

In view of the contractual provisions regarding Mr. Jones' compensation it appears that Mr. Jones was not employed on an intermittent basis but on a regular full-time basis. We have been informally advised by an official of the White Sands Missile Range that Mr. Jones was assigned to work a regularly scheduled tour of duty in a biweekly pay period. Unlike an intermittent expert or consultant, the travel expenses entitlement of an expert or consultant who is employed on a temporary basis is the same as a regular Government employee who is only entitled to travel and per diem expenses when on official business away from his duty station. A temporarily employed expert or consultant, just as a permanently employed individual is subject to the well-settled rule that an employee must bear the cost of transportation from his place of residence to his place of duty at his official station. See 35 Comp. Gen. 90, supra, and Andrew Paretti, B-191330, December 4, 1978, and decisions cited therein. Accordingly, since it appears on the basis

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of the record before us that Mr. Jones was employed on a temporary rather than an intermittent basis, 5 U.S.C. § 5703 would not provide a basis to authorize him reimbursement for his transportation and travel expenses for his travel from London to El Paso in May 1982 and for his return travel to London upon the expiration of his contract.

We note that even if Mr. Jones were entitled to transportation and travel expenses pursuant to 5 U.S.C. § 5703, that provision would not authorize the transportation of his family and household goods at Government expense.

Generally, a Government employee is responsible for his travel and relocation expenses to his first duty station. 53 Comp. Gen. 313 (1973). However, 5 U.S.C. § 5723 (1982) provides that an agency may pay the travel expenses of a new appointee if appointed to a position in the United States for which the Office of Personnel Management has determined that there is a manpower shortage. Transportation expenses of his immediate family and his household goods is also authorized.

Although the record does not indicate that Mr. Jones was appointed to a manpower shortage position, the Office of Personnel Management has determined that a shortage existed nationwide for all operations research analyst positions. See Appendix A of Federal Personnel Manual Chapter 571. Paragraph b of Appendix A provides that although the list of manpower shortage positions as set forth in Appendix A is arranged by occupational groups and series established under the General Schedule classification system, comparable positions not subject to that system also are covered. Accordingly it appears that the position occupied by Mr. Jones would be a manpower shortage position.

By virtue of the Army's authority to employ experts and consultants pursuant to 5 U.S.C. § 3109 and in view of the employer-employee relationship between Mr. Jones and the Government, he would be considered an "appointee" for purposes of reimbursement under 5 U.S.C. § 5723. Cf. 25 Comp. Gen. 731 at 733 (1946) and B-167815(1), January 13, 1970.

Accordingly, if the Army determines that Mr. Jones should be reimbursed under 5 U.S.C. § 5723 as an appointee

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to a manpower shortage position, we would have no objection. See B-164720, August 5, 1968. Under 5 U.S.C. § 5723, Mr. Jones would be entitled to payment of his travel expenses including per diem, from London to El Paso together with reimbursement for the transportation of his dependent wife and his household goods to El Paso provided that reimbursement was otherwise proper under the applicable travel regulations. He then would not be indebted for his travel and the transportation of his wife and household goods from London, England, to El Paso, Texas. However, section 5723 does not provide authority for reimbursing an employee for return travel and transportation costs for travel from his duty station to his previous residence. Mr. Jones would not be entitled to reimbursement for his travel expenses and the transportation of his wife and household goods from El Paso to his residence in England.

We note that contract line item 0003 provided that Mr. Jones would be authorized per diem in lieu of subsistence for each day he was in a travel status away from his regular place of employment, other than travel covered by contract line item 0002 (travel from his residence to his regular place of employment). Such reimbursement was to be in accordance with the Standardized Government Travel Regulations (now the Federal Travel Regulations, FPMR 101-7). As a temporary consultant, Mr. Jones was not entitled to authorization of per diem at his official duty station, the White Sands Missile Range. See Hector Avila Morales Jr., B-193170, supra, and decisions cited therein. We have been informally advised that Mr. Jones was not authorized or paid a per diem while at the White Sands Army Missile Range but that he was authorized travel expenses, including per diem, while assigned to various temporary duty stations. Such reimbursement would be proper provided that such payments of travel expenses and per diem were made in accordance with the Federal Travel Regulations (FPMR 101-7) and Volume 2 of the Joint Travel Regulations.

LEAVE ACCRUAL

We are also asked whether Mr. Jones is entitled to accrual of leave benefits under the contract as an employee of the Government.

Line H.9.1 of Mr. Jones' contract provided that he is entitled to accrue annual and sick leave in accordance with the regulations and instructions implementing the Annual and Sick Leave Act of 1951, as amended (5 U.S.C. §§ 6301-6311). We have held that an expert or consultant whose services are secured under 5 U.S.C. § 3109 on an employment rather than an independent contractor basis is entitled to annual and sick leave insofar as he is eligible under the applicable provisions of chapter 63, subchapter 1, title 5, United States Code. See Copp Collins, 58 Comp. Gen. 167 (1978). The annual and sick leave provisions at 5 U.S.C. §§ 6301-6311 do not apply to "a part-time employee who does not have an established regular tour of duty during the administrative workweek." See 5 U.S.C. § 6301(2)(B)(ii). See Copp Collins, 58 Comp. Gen. at 168. Accordingly, only those experts and consultants with an established tour of duty are entitled to the accrual of annual and sick leave. Copp Collins, 58 Comp. Gen. 167 and Dr. David Pass, B-194021, February 11, 1980.

Since the terms of the May 20, 1982 contract entered into between Mr. Jones and the agency appear to have contemplated that Mr. Jones would work on a regularly scheduled basis during each biweekly pay period, and since we have been informally advised that such was the case, it appears that he would be entitled to the accrual of annual and sick leave in accordance with 5 U.S.C. §§ 6301-6311, where otherwise proper.

LUMP-SUM LEAVE PAYMENT

We note that line H.9.4 of the contract provided that Mr. Jones may be paid a lump sum for his unused annual leave at the end of the contract. The certifying officer, citing 33 Comp. Gen. 528 (1951) notes that lump-sum payment for unused annual leave to contract employees is improper. Our decision in 33 Comp. Gen. 528 which involved a contract employee did not hold that lump-sum payment for unused annual leave may not be paid to contract employees. Rather, that case applied the general rule that when an employee transfers between positions covered by subchapter 1 of chapter 63 of title 5, United States Code, the agency from which he transfers shall certify his annual leave account to the employing agency for credit or charge. See 5 C.F.R. § 630.501 (1984). We are not aware of anything which would

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prohibit the payment pursuant to 5 U.S.C. § 5551 of a lump sum for unused annual leave upon the separation from Government service of an expert or consultant who was entitled to the accrual of leave as a Government employee.

PAYMENT FOR HOLIDAYS

We are also asked whether Mr. Jones may be paid for days on which he did not work due to a holiday. Line H.9.7 of his contract provided that he shall be paid for holidays or non-workdays "established by Federal Statute or Executive or Administrative Orders." An expert or consultant employed under the authority of 5 U.S.C. § 3109 is entitled to compensation for holidays on which no work is performed provided that the contract of employment or appointment papers specifically provides for holiday pay. See 28 Comp. Gen. 727 (1949), B-131457, September 19, 1962, and January 24, 1963, and Carlyle P. Stallings, B-131259, January 23, 1976. Since Mr. Jones' contract specifically provided that he would receive compensation for those holidays on which he did not work he is entitled to receive compensation for such days of nonwork, if otherwise proper.

DOCUMENTATION OF EMPLOYMENT

We note that the Army may have not properly documented Mr. Jones' employment by contract. The instructions in Chapter 304 of the Federal Personnel Manual on the employment of experts and consultants are applicable to individual expert or consultant services procured by contract if an employer-employee rather than an independent contractor relationship is created. See Subchapter 1-1a of Chapter 304 of the Federal Personnel Manual. Paragraph A-4 of Appendix A to Chapter 304 requires that the agency establish an official personnel folder for each expert or consultant employed, full-time, part-time, or intermittently, whether employed by appointment or contract. This official personnel folder must include a Standard Form 50, Notification of Personnel Action, showing the employment. Also see Carlyle P. Stallings, B-131259, supra. There is nothing in the record which indicates that a Standard Form 50 documenting Mr. Jones employment was prepared. In the future, the Army should ensure that it complies with the requirements of Chapter 304 of the Federal Personnel Manual where an expert or consultant is, in effect, an employee of the

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Government, regardless of whether that relationship was created by means of a formal contract. See B-174226, January 12, 1972, and March 13, 1972.

TIME LIMITATION ON EMPLOYMENT

Lastly, we wish to point out that 5 U.S.C. § 3109 expressly limits the authority thereunder to employ experts and consultants on a temporary basis for a period of only up to 1 year. See 28 Comp. Gen. 670 (1949). Subchapter 1-3c(2) of Chapter 304 of the Federal Personnel Manual expressly provides that an expert or consultant who serves under a temporary appointment in one service year may be reappointed the next year to the same position on only "a purely intermittent basis." Furthermore, that paragraph provides that the subsequent appointment in the next service year must cease "as soon as it loses its occasional or irregular character." We note that even if Mr. Jones' employment as of May 1, 1983, had been on an intermittent basis, Subchapter 1-2(5) of Federal Personnel Manual Chapter 304 provides that when an intermittent expert or consultant works more than one-half of full-time employment, i.e. he is paid for all or any part of a day for more than 130 days in a service year, the employment automatically ceases to be intermittent and becomes temporary.

Subchapter 1-1(a) of Chapter 304 of Army Regulations 690-300 provides that the provisions at Chapter 304 govern the employment of experts and consultants who are employed under excepted appointment or by contract. The Army's personnel regulations at Chapter 304 provide:

"Reappointment to same position. If an appointee has served in a position for more than 130 days in 1 service year, the individual may be granted approval to serve in the same position for the next year. However, the appointment will be on an intermittent basis for no more than 130 days. If, during the second year, the appointment loses its occasional or irregular character, it must be terminated." Subchapter 1-3c(2) of Chapter 304, Army Regulation 690-300, August 15, 1980.

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However, during the period of Mr. Jones' employment by contract the provisions in the annual appropriation acts for the Department of Defense provided authority to procure the services of experts and consultants pursuant to 5 U.S.C. § 3109 and also provided that such contracts could be renewed annually.⁵

The Defense Acquisition Regulations, applicable to all Department of Defense components including the Army, provide for the renewal of contracts for expert and consultant services as follows:

"The nature of the duties to be performed must be temporary (not more than one year) or intermittent (not cumulatively more than 130 days in one year). Accordingly, no contract shall be entered into for longer than one year at a time. (However, contracts may be renewed annually; see 22-212.)" Section 22-204.2(ii) of the Defense Acquisition Regulations.

Section 22-212.1 of the Defense Acquisition Regulations provides:

"22-212.1 General. A contract may provide for renewal--for a maximum of one year each time--by written notification to the contractor from the contracting officer."

Consistent with those provisions, section H.8.1 of Mr. Jones' employment contract provided that the contract is renewable at the option of the Government and that such renewals shall not exceed a maximum of one year each time.

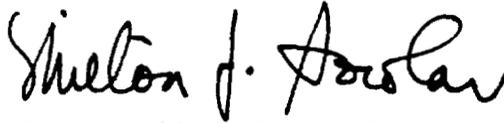
While the language of chapter 304 of the Army Regulations indicates that the period of employment in the

⁵ See section 703 of Public Law 97-114, December 29, 1981, 95 Stat. 1565, 1578, section 703 of Public Law 97-377, December 21, 1982, 96 Stat. 1830, 1849, and section 703 of Public Law 98-212, December 8, 1983, 97 Stat. 1421, 1437.

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same position as a temporary expert or consultant should be limited to one year, in view of the authority to the contrary provided in the appropriation acts and the Defense Acquisition Regulations, we will not pursue that matter further in this case. However, the Army should review its regulations and procedures to see that they are consistent and that they are being followed.

for 
Comptroller General
of the United States